Supreme Court, U.S.
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No. 08-487

IN THE

Supreme Court of the United States

ANDREW BELL, ET AL., PETITIONERS

v.

AMERICAN GREETINGS CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 28 U.S.C.A. § 1652 and *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938), 58 S.Ct. 817, interpreting the Tenth Amendment to the United States Constitution which states,

> "The powers not delegated to the United States [i.e., the national government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people,"

does a state statute prohibiting information obtained by an administrative investigation from being used in a civil matter fall with the powers reserved to the states?

PARTIES TO THE PROCEEDING

Andrew Bell, individually & on behalf of all others similarly situated; Darrell Blanchard, individually & on behalf of all others similarly situated; Ruby S. Brown, individually & on behalf of all others similarly situated, Plaintiffs - Appellants, Nenomoshia Carter, individually & on behalf of all others similarly situated; Mary Clarksenior, individually & on behalf of all others similarly situated; Michael Fletcher, Jr., individually & on behalf of all others similarly situated; Charlotte Gordon, individually & on behalf of all others similarly situated; Sheila Griffin, individually & on behalf of all others similarly situated; William Guy, individually & on behalf of all others similarly situated; Stella Hopkins, individually & on behalf of all others similarly situated; Sharonda Jefferson, individually & on behalf of all others similarly situated; LaKresha Johnson, individually & on behalf of all others similarly situated, Plaintiffs, Mary Frances Johnson, individually & on behalf of all others similarly situated; Natasha Johnson, individually & on behalf of all others similarly situated, Plaintiffs - Appellants, Tamara Jones, individually & on behalf of all others similarly situated, Plaintiff, Dorothy Long, individually & on behalf of all others similarly situated; Theori Madkins, individually & on behalf of all others similarly situated; Tonya Montgomery, individually & on behalf of all others similarly situated; Shirley Mouton, individually & on behalf of all others similarly situated, Plaintiffs - Appellants, Birdie Redd, individually & on behalf of all others similarly situated, Plaintiff, Bobbie Robinson, individually & on behalf of all others similarly situated; Linda Ross, individually & on behalf of all others similarly situated; Nute Sheppard, individually & on behalf of all others similarly situated; Maggie Stilwell,

individually & on behalf of all others similarly situated; Annie Taylor, individually & on behalf of all others similarly situated; Annie Taylor, individually & on behalf of all others similarly situated; Tisher Taylor, individually & on behalf of all others similarly situated, Plaintiffs - Appellants, Angela Thomas, individually & on behalf of all others similarly situated; Jimmy Trible, individually & on behalf of all others similarly situated, Plaintiffs, Evelyn White, individually & on behalf of all others similarly situated, Plaintiff - Appellant, Cynthia Whitehorn, individually & on behalf of all others similarly situated; Steve Whitehorn, individually & on behalf of all others similarly situated, Plaintiffs, Sheila Williams, individually & on behalf of all others similarly situated, Plaintiff - Appellant, Cathryn Baugus; Veronica Bogan; Farrah Boyd, Plaintiffs, Veronica Harris, Plaintiff - Appellant, Tracie Herron; Renea Junearick, Plaintiffs, Tawanda Kirby; Shirley McGowan, Plaintiffs - Appellants, Belinda Milloway, Plaintiff, Martha Morris; Joyce Moss, Plaintiffs - Appellants, Ureka Smith; Treece Speed; Lillie Staten; Constance Swanigan; Walter Taylor; Kim Whitted, Plaintiffs, Iola Williams, Plaintiff - Appellant, Sherry Wilson, Plaintiff, Kilticia Burks,

Petitioners.

American Greetings Corporation,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Andrew Bell, et al. respectfully petition for a writ of certiorari to review the opinion and judgment, and denial of petition for rehearing en banc of the U.S. Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, dated May 29, 2008, not reported, is reproduced at App. A., 1a-2a.

The order of the U.S. District Court for the Eastern District of Arkansas, Jonesboro Division, dated May 29, 2007, is reproduced at App. B, 3a-14a.

The order of the United States Court of Appeals for the Eighth Circuit, dated July 10, 2008, not reported, is reproduced at App. C, 15a.

The order of the U.S. District Court for the Eastern District of Arkansas, Jonesboro Division, dated July 31, 2006, is reproduced at App. D, 16a-17a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was entered on May 29, 2008. A petition for rehearing and petition for rehearing en banc was timely filed and was denied on July 10, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the denial of rehearing and rehearing en banc. This

Court has jurisdiction to review the opinion of the U.S. Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Amendments to the United States Constitution

Ninth Amendment:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Tenth Amendment:

> "The powers not delegated to the United States [i.e., the national government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Statutory Provisions

28 U.S.C.A. § 1652 - State laws as rules of decision:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. (June 25, 1948, c. 646, 62 Stat. 944.)

Arkansas Code Annotated § 11-10-314(a):

> (a)(1) Except as otherwise provided in this section, information obtained by the Director of the Department of Workforce Services from any employing unit or individual pursuant to the administration of this chapter and any determination as to the rights or status of any employer or individual made by the director pursuant to the administration of this chapter shall be held confidential and shall be protected by government.
>
> (2)(A) The information shall not be used in any action or proceeding before any court, administrative tribunal, or body except those created by this chapter unless the Department of Workforce Services is a party, a real party in interest, or a complainant therein or unless the litigation involves criminal actions brought under provision of this chapter.

STATEMENT

In late 2002, respondent/appellee announced a restructuring which would affect 82 positions. Within months of the restructuring (downsizing), respondent/appellee terminated 121 employees for alleged unemployment fraud, four (4) or 3% of whom were white males under the age of forty (40).

Of the 121 discharged for alleged unemployment fraud, only thirty (30) or 24% were white. After the initial round of discharges for alleged unemployment fraud, eighty (80) employees were discharged, almost

the same number of machines or positions displaced by the restructuring (downsizing), eighty-two (82). Obviously, respondent's/appellee's policies and procedures had a disparate impact on blacks and those over the age of forty (40).

The Equal Employment Opportunity Commission ("EEOC") found:

> The evidence shows disparate treatment between employees who were discharged and those who were not for alleged unemployment compensation fraud. There were numerous discrepancies and inconsistencies between the written documentation and witness testimony. In addition, the statistical evidence is significant in showing that blacks as a class were discharged at a rate far higher than whites for alleged unemployment compensation fraud.
>
> The evidence further shows a pattern and practice of discrimination against black individuals in terms of discharge.

Petitioners/Appellants filed their complaint alleging age and race discrimination pursuant to Title VII and the ADEA. Petitioners/Appellants objected to information gained through a state agency investigation (ADWS) from being used against them in a civil matter. *See* Arkansas Code Annotated § 11-10-314(a).

State agency investigations and findings are conducted without regard to any rules of evidence, federal or state. Hearsay upon hearsay is allowed. The

employer often represents the employee as well as the employer during state agency hearings.

The district court ignored state law, ACA § 10-14-314, and adopted facts from the ADWS investigation and found petitioners/appellants had committed fraud.

Respondent/Appellee discharged petitioners/appellants alleging they committed unemployment fraud without regard to intent. Respondent/appellee based its decision on information gained from the Arkansas Department of Workforce Services ("ADWS")[1] who based their information on non-credible information supplied by respondent/appellee.

Petitioners/appellants all understood ADWS policies and procedures, and all denied making errors, whether intentional or unintentional.

It is undisputed that certain white employees, friends of respondent's/appellee's human resource managers, under the age of forty (40), were not discharged albeit there were discrepancies in their records of attendance and ADWS benefits.

In response to petitioners'/appellants' objections, to respondent's/appellee's continuing depositions, in violation of the statutory privilege relating to information provided to or obtained from the ADWS, codified at Arkansas Code Annotated § 11-10-314, the district court temporarily ruled that the depositions could continue and the court would at a later date rule

---

[1] Formerly Arkansas Employment Security Department ("AESD").

"on the applicability of the privilege and whether objections were previously waived...." App. 17a.

Counsel for respondent/appellee agreed that objections would be reserved as to the use of said information based upon the confidentiality of that information and the privilege attached to that information by the Arkansas Code.

Despite the district court's obligation to rule at a later date on the applicability of the privilege and whether objections were previously waived, the district court never entered a formal order, but by its findings in its final order dismissing petitioners/appellants wherein the court stated petitioner/appellants were not qualified because they had committed unemployment fraud the district court in effect ruled against the petitioners/appellants and the privilege. Not only did the privilege exist because of Arkansas Code Annotated § 11-10-314, but the ruling also violated Federal Rules of Evidence as the determination of fraud was based on hearsay and respondent's/appellee's attendance records which lacked credibility. Administrative hearings at the state level are not required to conform to the Rules of Evidence, thus, hearsay and other violations occur frequently. Due process is nonexistent. Thus, the necessity of the privilege created by Arkansas Code Annotated § 11-10-314.

REASON FOR GRANTING THE PETITION

A CONFLICT EXISTS BETWEEN THE EIGHTH, SIXTH AND SEVENTH CIRCUITS' OPINIONS CONCERNING EVIDENTIARY DISPUTES, EVIDENCE THAT IS PRIVILEDGED BY VIRTUE OF STATE LAW, 28 U.S.C.A. § 1652 AND *ERIE R.R. CO. V. TOMKINS*, 304 U.S. 64 (1938), 58 S.CT. 817, INTERPRETING THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The lower courts erred in their interpretation of rights reserved to the states under prior U.S. Supreme Court decisions and the United States Constitution. Clarification from this Court is needed to alleviate confusion among the circuits.

The lower courts' decisions conflict with this Court's decision in *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938), 58 S.Ct. 817, and interpreting the United States Constitution and 28 U.S.C.A. § 1652.

The Ninth Amendment to the United States Constitution states:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment to the United States Constitution, states:

> "The powers not delegated to the United States [i.e., the national government] by the

> Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Erie R.R. Co. v. Tomkins, 304 U.S. 64 (1938), 58 S.Ct. 817, cited by respondent/appellee in the lower courts, actually supports petitioners'/appellants' position. This Court, in *Erie*, held:

> "In federal courts, except in matters governed by Federal Constitution or by Acts of Congress, law to be applied in any case is law of the State." 28 U.S.C.A. §1652.

In *Erie*, there were no State statutes to support the lower court's application of federal law, but only common law; here, Ark. Code. Ann. § 11-10-314, which prohibits the use of evidence gained through an ADWS investigation to be used in a civil matter, should have been followed. The State legislature understood that an ADWS investigation did not begin to provide due process to an employee who was often uneducated and unrepresented in the proceedings. As here, the employee was often, if at all, represented by the employer who was trying to substantiate improper allegations to support its discharge of the employee. In addition, objections were made on the basis of hearsay in violation of the state and federal Rules of Evidence.

Petitioners/Appellants respectfully submit that the lower court erred when it ignored Ark. Code Ann. §11-10-314(a)(2)(A) (Disclosure of Information) in considering evidence (albeit uncredible) and (hearsay) gleamed from an ADWS investigation.

The lower courts' consideration of evidence in violation of Ark. Code Ann. §11-10-314(a)(2)(A) (Disclosure of Information), and total disregard of the EEOC's findings of both race and age discrimination, is error. The lower court considered information prohibited by statute, ADWS findings, and failed to give consideration to evidence legally admissible, EEOC determinations.

EEOC findings which should have been considered by the lower courts, but were not, include the following. Kay Klugh, Director of the Little Rock Area Office of the EEOC submitted the following Determination:

> "Under the authority vested in me by the Commission, I issue the following determination as to the merits of this charge."
>
> "Respondent is an employee within the meaning of the Age Discrimination in Employment Act (ADEA), as amended, and Title VII of the civil Rights Act of 1964, as amended. Timeliness and all other requirements for coverage have been met."
>
> "Charging Party alleged he was discharged because of his age, 50, and because of his race, black, in violation of Title VII. The investigation has shown reasonable cause to believe the allegations are true. There is also reasonable cause to believe that a class of former black employees have been discriminated against."

"The evidence shows disparate treatment between employees who were discharged and those who were not for alleged unemployment compensation fraud. There were numerous discrepancies and inconsistencies between the written documentation and witness testimony. In addition, the statistical evidence is significant in showing that blacks as a class were discharged at a rate far higher than whites for alleged unemployment compensation fraud."

"The evidence further shows a pattern and practice of discrimination against black individuals in terms of discharge."

"Title VII requires that if the Commission determines there is reasonable cause to believe that a violation has occurred, it shall endeavor to eliminate the alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Having determined there is reasonable cause to believe that a violation has occurred, the Commission now invites the Respondent to join with it in a collective effort toward a just resolution of this matter."

"Disclosure of information obtained by the Commission during the conciliation process will be made in accordance with the statute and Section 1601.26 of the Commission's procedural regulations. When the Respondent declines to enter into settlement discussions, or when the Commission's Representatives for any other reasons are unable to secure an agreement

> acceptable to the Commission, I will so inform the parties in writing and advise them of the court enforcement alternative available to the Charging Party and the Commission."

Respondent's/Appellee's pleading, Defendant's Opposition to Plaintiffs' Motion in Limine, filed in the lower court, corroborates Petitioners'/Appellants' arguments.

> "The information shall not be used in any action or proceeding before any court...except those created by this chapter... unless the [Department] is a party...or unless the litigation involves criminal actions."Ark. Code Ann. §11-10-314(a)(2)(A) ("Disclosure of Information").

> "Some courts have made a distinction as to whether a state statute, like the one relied upon by Plaintiffs, simply provides for confidentiality or if it creates a privilege. Compare *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1205 (9th Cir. 1975) ("The records are confidential but not privileged."), with *Am. Civil Liberties Union of Miss. v. Finch*, 638 F.2d 1336, 1342 (5th Cir. 1981) ('Even though the statute does not explicitly create an evidentiary privilege, but merely provides in general terms for the confidentiality . . . we are willing to assume, for the sake of argument, that Mississippi courts would construe the statute as creating a privilege.'). AG is willing to make the same assumption here."

"AG relied heavily on information it received from AESD to conduct its investigation and terminate Plaintiffs."

"Under the *Erie* doctrine, a federal court must apply state substantive law and federal procedural law. *Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938). Federal Rule of Evidence 501 ("FRE 501") sets forth the principles by which a federal court determines whether the documents and information at issue is an evidentiary dispute are privileged. Fed. R. Evid. 501. FRE 501 controls which law, state or federal, should be applied and is the starting point in determining whether the confidential privilege Plaintiffs assert will preclude AG's introduction of any AESD materials. FRE 501 provides:"

> "Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, *the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.* However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in

accordance with State law. *Id.* (Emphasis added.)"

"In this case, there is no dispute that the Arkansas statute creates a State government privilege.[2] Thus, as set forth in FRE501, this Court is guided by common law in determining whether to apply the privilege to this case."

"Federal common law provides that, where the issue of admissibility of evidence arises in federal question litigation and such evidence is relevant to federal claims as well as to pendent state law claims, the state privilege law is only binding in actions where state law controls the merits of the claims at issue.[3] Further, a federal court deciding a claim arising under federal law with pendent state law claims need not apply a confidential privilege created solely under state law.[4] Instead, where no

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[2]Ark. Code Ann. §11-10-314(a)(1) (providing, "[e]xcept as otherwise provided in this section, information obtained by the [AESD]. . .shall be held confidential and shall be protected by government privilege.

[3]Fed. R. Evid. 501. *See also, e.g., Klyuch*, 2005 U.S. Dist. LEXIS 1843 (D. Minn. Feb. 9, 2005) ("[Plaintiff's] claims are premised on federal discrimination laws, and the existence of pendent state law claims does not change this analysis."); *Baldwin v. Rice*, 144 F.R.D. 102, 106 (E.D. Cal. 1992) ("There can be no doubt, however, that a state legislature cannot purport to make binding pronouncements of law concerning what evidence may be privileged or otherwise admissible in a federal court action involving claims based on federal law."); *accord Hancock v. Dodson*, 958 F.2d 1367, 1372-73 (6th Cir. 1992)(noting that this general principle applies even when pendent state law claims exist).

[4]The legislative history of Rule 501 expresses the most explicit statement that the federal law of privileges controls when pendent

federal rule exists governing the statutory privilege asserted in the case, the court is given the task to balance the interests favoring and opposing confidentiality during litigation.[5]"

"And as this Court itself has repeatedly recognized, if there are both state and federal claims in the same case, and a privilege would exist under one law but not the other, the privilege is usually held not to be available.[6] Plaintiff cites no authority using a state unemployment privilege to keep out evidence that is otherwise admissible. While not expressly addressed by the Eighth Circuit, at least one court in this Circuit and other courts from sister circuits have expressly refused to recognize a state statute declaring unemployment records

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state law claims are asserted. The senate report stated that "the Federal law of privileges should be applied with respect to pendent State law claims when they arise in a Federal question case." S. Rep. No. 1277, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7059 n. 16 (1974).

[5]*Trammel v. U.S.*, 445 U.S. 40, 47 (1980)(noting that courts should tolerate privileges "only to the very limited extent that....excluding relevant evidence has a public good transcending the normally predominating principle of utilizing all rational means for ascertaining the truth"); *accord Farley v. Farley*, 952 F.Supp. 1232, 1236 (M.D. Tenn. 1997) ("In civil actions arising under federal law, the presiding federal judge has greater liberty to fashion evidentiary privileges based upon reason and experience.").

[6]*Miles v. Century 21 Real Estate LLC*, No. 4:05-CV-1088 GTE, 2006 U.S. Dist. LEXIS 6974 (E.D. Ark. Sept. 21, 2006) (citing Wright, Miller & Marcus, Federal Practice and Procedure §2016, p. 226); *In re Grand Jury Subpoena Am. Broadcasting Co., Inc.*, 947 F.Supp. 1314, 1321 (E.D. Ark. 1996) (finding state law privileges inapplicable to a federal proceeding); *accord Klyuch*, 2005 U.S. Dist. LEXIS 1843 at *1.

> privileged and held such records admissible in the interest of promoting a full and fair investigation into claims asserted by plaintiffs in subsequent litigation proceedings.[7]"

Within months of an announced restructuring (downsizing), respondent/appellee terminated 121 employees for alleged unemployment fraud, four (4) or 3% of whom were white males under the age of forty (40). Most employees discharged had between ten and thirty-eight (38) years of employment with respondent/appellee. This loyalty to the company was unquestioned.

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[7]*See, e.g., Klyuch*, 2005 LEXIS 1843 at *1 (allowing evidence obtained in an unemployment benefit evidentiary hearing to be introduced in a race discrimination case despite a state statute prohibiting its use in any proceeding not initiated by the department); *Klaus v. Kilb. Rogal & Hamilton Co. of Ohio*, 437 F.Supp.2d 706 (S.D. Ohio 2006) (holding that state agency records were relevant and admissible in a discrimination suit to negate pretext over the plaintiff's objection that a state statute prohibited disclosure of such documents in any legal proceeding); *see also EEOC v. Ill. Dep't. of Employment Security*, 955 F.2d 106 (7th Cir. 1993) (refusing to apply a state statute declaring unemployment records privileged in a subsequent proceeding in federal court); *U.S. v. Wilson*, 960 F.2d 48 (7th Cir. 1992) (same); *accord U.S. v. Chirella*, 588 F.2d 1358, 1372 (2d Cir. 1978) (same); *Gallardo v. Bd. of County Commr's.*, 881 F.Supp. 525 (D. Kan. 1995) (same); *Young v. Adams Bus. Forms Inc.*, 1988 U.S. Dist. LEXIS 972, No. 87-4081-S (D. Kan. Jan. 22, 1988) (same); *Tutman v. WBBM-TV/CBS, Inc.*, 1997 U.S. Dist. LEXIS 13281, No. 96 C4424 (N.D. Ill. Sept. 3, 1997) (same).

Of the 121 discharged for alleged unemployment fraud, only thirty (30) or 24% were white. After the initial round of discharges for alleged unemployment fraud, eighty (80) AG employees were discharged, almost the same number of machines or positions displaced by the restructuring, downsizing, eighty two (82).

The lower court dismissed petitioners'/appellants' Complaint, upholding respondent's/appellee's motion for summary judgment, finding:

> "Plaintiffs failed to show they are qualified for the position because they were shown to have engaged in dishonesty and have disqualified themselves. "However, they have not shown that they were meeting Defendant's legitimate work expectations because they were discharged for committing unemployment fraud."

The lower courts clearly relied on ADWS information which was based on respondent's/appellee's information provided during the investigation.

In early 2002, at the time of the restructuring, the demographics of respondent's/appellee's workforce included 63% of employees over the age of 40 and 7% over the age of 60.

According to documentation provided by EEOC on October 3, 2006, during a seven-month period, from April 2002 to November 1, 2002, sixty-five (65) employees were separated from respondent/appellee, all between the ages of 50 and 72.

Age	No. of Employees
72	1
70	1
69	1
68	1
66	2
65	4
64	1
63	4
62	4
61	7

The Eighth Circuit decision which was not reported, and the Seventh and Sixth Circuit decisions cited herein, conflict with this Court's holding in *Erie*. Without this Court's clarification, the due process rights of individuals concerning admissions of evidence will continue to be abrogated by the federal courts misinterpretation and application of this Court's decision in *Erie*.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,
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(any footnote(s) trail end of each document)

No. 07-2565, No. 07-2598

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Andrew Bell, et al.
Appellant

v.

American Greetings Corporation,
Defendant - Appellee.

May 12, 2008, Submitted

May 29, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Before WOLLMAN, MURPHY, and SMITH, Circuit Judges.

OPINION

PER CURIAM.

Plaintiff appellants were among over 100 employees of appellee American Greetings Corporation who were fired after it was discovered that they had committed unemployment fraud. Appellants challenge the district court's[1] adverse grant of summary judgment on their age and race discrimination claims brought under the

Arkansas Civil Rights Act, the Age Discrimination in Employment Act, Title VII, and 42 U.S.C. § 1981, and its denial of their motion for reconsideration. On cross appeal American Greetings challenges the district court's denial of its motion for sanctions.

After reviewing the record de novo, with the evidence and all reasonable inferences in a light most favorable to appellants, *Doe v. VA*, 519 F.3d 456, 460 (8th Cir. 2008), we conclude that the district court did not err in granting American Greetings's motion for summary judgment, nor did it abuse its discretion in denying appellants' motion for reconsideration. As noted by the district court, there was no evidence that any similarly situated white employee or employee under the age of 40 who engaged in unemployment fraud was treated differently and, in fact, every employee who was known to have committed unemployment fraud during the investigation period was fired for that fraud. We also conclude that the district court did not abuse its discretion in denying American Greetings's motion for sanctions, *see United States v. Pugh*, 445 F.3d 1066, 1068 (8th Cir. 2006) (standard of review). The judgment is affirmed. *See* 8th Cir. R. 47B.

Foonote

1The Honorable William R. Wilson, United States District Judge for the Eastern District of Arkansas.

NO. 3:04CV00303-WRW

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS,
JONESBORO DIVISION

ANDREW BELL, ET AL.,
PLAINTIFFS

v.

AMERICAN GREETINGS CORP.,
DEFENDANT

May 29, 2007, Decided
May 29, 2007, Filed

JUDGES: William R. Wilson, Jr., UNITED STATES DISTRICT JUDGE.

ORDER

Plaintiffs brought suit against their employer, American Greetings Corporation, alleging that they were discriminated against based on their race, sex, and age in violation of Title XII, 42 U.S.C. § 1981, Arkansas Civil Rights Act ("ACRA"), [1] and the Age Discrimination in Employment Act ("ADEA"). [2] The sex discrimination claims and several of the Plaintiffs have since been dismissed. Pending is Defendant's Motion for Summary Judgment on the remaining claims and remaining Plaintiffs (Doc. No. 127).

I. Background [3]

Defendant American Greetings Corporation is a foreign corporation organized under the laws of the state of Ohio and is qualified to do business in the state of Arkansas. Defendant's principal place of business is Osceola, Arkansas, where it manufactures and distributes seasonal greeting cards and related products. Approximately 1,250 individuals are employed at the Osceola facility.

Plaintiffs are all citizens and residents of the state of Arkansas; and are former employees of American Greetings' Osceola facility. Due to the seasonal nature of manufacturing at Defendant's Osceola plant, the company created something called "company convenience." This is a voluntary layoff that correlates with down swings in production, which allows Defendant to maintain its trained work force and allows its employees to draw unemployment benefits for a maximum of 8-10 weeks although they are technically still employed by Defendant. At any time during company convenience, Defendant can call an employee to help with production for a day or more. Defendant provides the Arkansas Employment Security Division ("AESD") with a list of employees taking company convenience along with the tentative dates of layoff. However, if an employee is called to work during company convenience time, it is the employee's responsibility to notify the AESD.

In 2002, American Greetings began dismissing a large group of its hourly employees. Approximately 120 out of 1,100 employees were dismissed. Defendant asserts that these dismissals were the result of a thorough investigation on its part -- after prompting by the AESD -- of employees improperly claiming

unemployment compensation for periods in which they were actually working. Plaintiffs allege that the investigation was a pretext -- a mask for dismissals driven by illegal discrimination on the basis of sex, race, and disability. Moreover, Plaintiffs suggest that the timing of the terminations for alleged unemployment fraud was suspicious, coming just months after Defendant announced that it would begin a "restructuring" of the plant.

In March 2002, Defendant discovered that one of its hourly employees had repeatedly failed to report all of her earnings to the AESD when filing for unemployment benefits. After the discovery, Defendant contacted its third party administrator for unemployment claims, and learned that he had not been monitoring unemployment claims for under reporting. Basically, Defendant and the AESD discovered that employees were fraudulently claiming unemployment benefits while simultaneously working for Defendant.

The discovery prompted Defendant to investigate all 1,180 employees who had taken company convenience or non-scheduled time off during the previous three years. Defendant maintains that when under-reporting was discovered, the employee was fired regardless of length of service, race, age, or sex. Defendant further maintains that it fired these employees in compliance with its written policy prohibiting misrepresentation, dishonesty, and unauthorized altering or falsification of company records.

Of the 122 employees terminated, four employees were able to prove the under-reporting was caused by clerical errors made by Defendant, and they were

reinstated. Every termination was conducted by Frank Richardson, a white male, who worked for Defendant as a human resource manager.

In an April 27, 2005 Order, the sex discrimination claims of Group I Plaintiffs, [4] Plaintiff Michael Fletcher's Title VII claim, and the Title VII and ADEA claims of all Group II and Group III Plaintiffs were dismissed. [5] A September 11, 2006 Order dismissed Plaintiffs LaKresha Johnson and Kim Whirled for failing to appear for depositions. [6] Plaintiffs Sherry Wilson, Veronica Bogan, and William Guy were similarly dismissed on October 3, 2006. [7] Summary judgment has been entered against two individual Plaintiffs, Constance Swanigan [8] and Walter Taylor. [9] The remaining claims are as follows: Group I has ADEA, ACRA, Title VII, and § 1981; Group II and III have § 1981.

II. Standard of Review

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided on purely legal grounds. [10] The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party. [11]

The Court of Appeals for the Eighth Circuit has cautioned that summary judgment is an extreme remedy that should only be granted when the movant has established a right to the judgment beyond controversy. [12] Nevertheless, summary judgment promotes judicial economy by preventing trial when no genuine issue of fact remains. [13] This Court must view the facts in the light most favorable to the party opposing the motion. [14] The Eighth Circuit has also set out the burden of the parties in connection with a summary judgment motion:

> [T]he burden on the party moving for summary judgment is only to demonstrate, *i.e.*, "[to point] out to the District Court," that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted. [15]

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. [16]

III. Analysis

A. Procedure

Plaintiffs allege race and age claims under ACRA. Because ACRA does not protect against age discrimination claims, [17] Plaintiffs' ACRA age discrimination claims are DISMISSED.

Defendant next argues that Group II and III Plaintiffs' ACRA claims are timed barred. ACRA requires an employee to bring a suit within one year of the alleged discrimination, or within ninety days of receipt of the notice of right to sue from the EEOC, whichever is later. [18] All of the Plaintiffs in Group II and III were fired between May and December 2002; however, this lawsuit was not filed until August 31, 2004. Therefore, Plaintiffs had until May 2004 at the latest to timely file suit. [19] Accordingly, Group II and III Plaintiffs' ACRA claims are DISMISSED as untimely.

B. Discrimination

Plaintiffs allege that they were terminated on the basis of age in violation of ADEA, on the basis of race in violation of § 1981 and ACRA, and on the basis of age and race in violation of Title VII. Although the *McDonnell Douglas* [20] method of analysis arose in the context of Title VII, its burden-shifting framework is often applied to cases arising under the ADEA and § 1981. [21] The burdens of proof for claims brought under Title VII and § 1981 are identical. [22] Likewise, claims under ACRA receive the same analysis as Title VII claims. [23] Therefore, I will consider the Title VII claims as including the § 1981, ACRA, and ADEA claims.

Defendant argues that (1) Plaintiffs cannot establish a *prima facie* case of either race or age discrimination, and (2) even if Plaintiffs were able to make a *prima facie* showing, Defendant had a legitimate, non-discriminatory reason for their terminations. Defendant notes that Plaintiffs concede that they have no direct evidence of discrimination, and that no one with Defendant ever suggested that Plaintiffs were fired because of their race or age.

1. Age

The ADEA forbids employers from taking adverse employment actions against employees because of their age. [24] Plaintiffs can establish a *prima facie* case by showing that (1) they are at least 40 years of age; (2) they are qualified for the positions; (3) they were terminated; and (4) they were replaced by someone substantially younger. [25] Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its actions, and then back to plaintiff to show that the defendant's reason was pretextual. [26] The burden of production rests with Plaintiffs. [27]

Plaintiffs do not meet their *prima facie* burden because they do know if they were replaced or if so, the age of the individual who replaced them. Instead, Plaintiffs attempt to use statistical data to show a disparate impact on employees over 40 years of age. However, before Defendant terminated any of the Plaintiffs for fraud, 54.8% of the hourly workforce was 40 years of age or older. After the last termination, 56.5% of the hourly workforce was 40 years of age or older. Moreover, of the 122 employees fired for unemployment

fraud, only 38.5% were 40 years old or older. Plaintiffs failed to show they are qualified for the position because they were shown to have engaged in dishonesty and have disqualified themselves.

2. Race

Under *McDonnell Douglas,* Plaintiffs can establish a *prima facie* case of discrimination by showing that: 1) they are members of a protected group; 2) they were meeting Defendant's legitimate expectations; 3) they were discharged; and 4) the discharge occurred in circumstances that give rise to an inference of unlawful discrimination.

Plaintiffs, either because of their age or race, are members of a protected group. However, they have not shown that they were meeting Defendant's legitimate work expectations because they were discharged for committing unemployment fraud. Rather than contest that the allegations of unemployment fraud, Plaintiffs' deposition testimony reveals that they simply cannot recall when they worked, had earnings, claimed, or received unemployment benefits during the weeks in question. [28] Defendant relied on attendance records and payroll records to determine whether an employee was under-reporting unemployment wages. Every employee who was terminated had an opportunity to refute the fraud; however, only four employees did so. All four employees were rehired. When deposed, each Plaintiff stated that they understood the AESD claims process; therefore, Defendant determined that their misuse of the process was intentional. Based on this, Defendant maintains that it had a good faith belief, after a thorough investigation, that the Plaintiffs

deliberately under-reported their wages to obtain AESD benefits.

Moreover, Plaintiffs have not been able to point to one similarly situated white employee or employee under the age of 40 who engaged in unemployment fraud and was treated differently. In fact, not a single Plaintiff had personal knowledge of any employee who committed fraud during the three year investigative window who was not terminated for that fraud.

Defendant maintains that in April 2002, before the first termination, 41.5% of its hourly employees were African-American. In comparison to October 2002, after the final termination, 39.7% of its hourly employees were African-American -- only a 1.8% decline, which Defendant alleges is not statistically significant. [29]

Plaintiffs point to areas in Defendants company convenience policy where mistakes in reporting can be made. However, because federal courts "do not sit as a super-personnel department that second guess business decisions," [30] Defendant's decision to terminate any employee who committed unemployment fraud, regardless of intent, cannot be questioned.

IV. Conclusion

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED. Plaintiffs' Motion in Limine (Doc. No. 92), Motion for Order Directing Non-Jury Trial (Doc. No. 167), and Motion for Order to Interrogate Jury Commissioner (Doc. No. 169) are DENIED as MOOT. Defendant's Motion for Sanctions (Doc. No. 89) is DENIED.

IT IS SO ORDERED this 29th day of May, 2007.

/s/ Wm. R. Wilson, Jr.

UNITED STATES DISTRICT JUDGE

JUDGMENT

Based on the Order that was entered on this day, Plaintiffs' claims are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 29th day of May, 2007.

/s/ Wm. R. Wilson, Jr.

UNITED STATES DISTRICT JUDGE

Footnotes

1 Ark. Code Ann. § 16-123-101.

2 29 U.S.C. §§ 621-634.

3 Background taken from an earlier declaratory judgment order (Doc. No. 23).

4 The Complaint divides Plaintiffs into three groups labeled I, II, and III. It appears that Plaintiffs in Groups II and III did not timely file their EEOC charges of discrimination.

5 Doc. No. 23.

6 Doc. No. 75.

7 Doc. No. 79.

8 Doc. No. 161.

9 Doc. No. 152.

10 *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed R. Civ. P. 56.

11 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

12 *Inland Oil & Transport Co. v. United States*, 600 F.2d 725, 727 (8th Cir. 1979).

13 *Id.* at 728.

14 *Id.* at 727-28.

15 *Counts v. MK-Ferguson Co.*, 862 F.2d 1338, 1339 (8th Cir. 1988) (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-74 (8th Cir. 1988) (citations omitted)).

16 *Anderson*, 477 U.S. at 248.

17 *Morrow v. City of Jacksonville*, 941 F. Supp. 816, 826 (W.D. Ark. 1996) ("The list of protected classes [under ACRA] does not include those over 40 or any other age group.") (citing Ark. Code Ann. § 16-123-105).

18 Ark. Code Ann. § 16-123-107.

19 Doc. No. 128, pp. 20-1.

20 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

21 *Garner v. Arvin Indus.*, 77 F.3d 255, 257 (8th Cir. 1996) (ADEA); *Shannon v. Ford Motor Co.*, 72 F.3d 678, 682-83 (8th Cir. 1996) (Title VII and § 1981); *Richmond v. Board of Regents of Univ. of Minn.*, 957 F.2d 595, 598 (8th Cir. 1992) (ADEA and § 1981).

22 *See Roark v. City of Hazen*, 189 F.3d 758, 761 (8th Cir. 1999).

23 Ark. Code Ann. § 16-123-105 (Supp. 2001).

24 29 U.S.C. § 623(a)(1).

25 *Haas v. Kelly Services, Inc.*, 409 F.3d 1030, 1035 (8th Cir. 2005).

26 *McDonnell Douglas*, 411 U.S at 802.

27 *Pope v. ESA Servs.*, 406 F.3d 1001, 1006.

28 Defendant's Ex. 127, pp. 12-13.

29 See *Stidham v. Minn. Mining & Mfg. Inc.*, 399 F.3d 935, 938 (8th Cir. 2003) (holding a 4% decline in workforce over forty is not statistically significant.).

30 *Haas v. Kelly Servs., Inc.*, 409 F.3d 1030, 1036 (8th Cir. 2005).

7/10/08

No. 07-2565, No. 07-2598

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Andrew Bell, et al.
Appellant

v.

American Greetings Corporation,
Defendant - Appellee.

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

7/31/2006
NO. 3:04CV00303-WRW

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS,
JONESBORO DIVISION

ANDREW BELL, ET AL.,
PLAINTIFFS

v.

AMERICAN GREETINGS CORP.,
DEFENDANT

ORDER

The Court held a teleconference hearing witb counel for the Parties on January 3, 2006 concerning a statutory privilege relating to information provided to or obtained from the Arkansas Employment Security Department (the "AESD"), codified at Arkansas Code Annotated Sec. 11-10-314. During that teleconference, the Court ruled that the Parties could go forward and continue deposition in this case for the remainder of that week without waiving such privilege by things said or do during the depositions, to the extent the privilege is otherwise applicable and was preserved previously through timely objections.

The Court held a teleconference hearing with counsel again on July 27, 2006 and, consistent with the above ruling, the Court hereby further temporarily RULES that the Parties may go forward and continue deposition and discovery in this case with respect to

information or documents relating to the AESD without waiving any objections. The Court will received briefs and rule at a later date on the applicability of the privilege and whether objections were previously waived by the Parties prior to January 3, 2006.

IT IS SO ORDERED